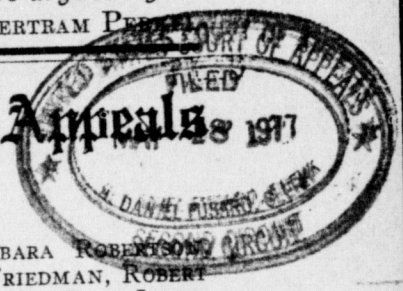
United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL **74-2352**

To be argued by
BERTRAM PERKEL



United States Court of Appeals
For the Second Circuit

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK; ABRAHAM BEAME, as MAYOR OF THE CITY OF NEW YORK; JOHN V. LINDSAY; HARRY BRONSTEIN, as CITY PERSONNEL DIRECTOR; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the BOARD OF EDUCATION OF THE CITY OF NEW YORK; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF DEFENDANT-APPELLEE DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN

HARTMAN & CRAVEN
Attorneys for Defendant-Appellee
District Council 37 Health & Security Plan
460 Park Avenue
New York, New York 10022
(212) 753-7500

Of Counsel:
BERTRAM PERKEL
VICTOR METSCH

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Docket No. 74-2352

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

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BRIEF OF DEFENDANT-APPELLEE DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN

Preliminary Statement

This brief is submitted by defendant-appellee District Counsel 37 Health & Security Plan in support of the decision of the United States District Court for the Southern District of New York dismissing plaintiffs-appellants' complaint for failure to state a cause of action upon which relief can be granted.

Statement of Issue Presented for Review*

Whether a complaint which merely asserts that defendant District Council 37 Health & Security Plan ("H & S Plan") has discriminated against women by failing to include within its otherwise broad plan of health and disability benefits, pregnancy and related disabilities as covered risks, states a cause of action under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000(e) *et seq.*?

Statement of the Case**

A. The Relevant Parties

Defendant H & S Plan is a non-contributory union welfare fund (21a)† which is a creature of the collective

* Plaintiffs have, in this omnibus litigation, sued many and various defendants. The issue presented for review in this brief, is that single issue which is applicable to the one cause of action asserted against defendant District Council 37 Health & Security Plan.

** Plaintiffs' brief, unfortunately, fails to parse out their complaint which asserts some 11 causes of action against 17 separate defendants. The statement of the case in this brief, addresses itself to that *one* cause of action which is brought against defendant H & S Plan and, except where required for clarity, does not treat with the complaint as a whole.

† References in parentheses followed by "a" are to pages of the Appendix on Appeal.

bargaining agreements between the defendant City of New York ("City") and defendant District Council 37, AFSCME (AFL-CIO) ("D.C. 37"). This welfare plan covers all employees in the relevant units and their families without regard to sex and provides the traditional supplemental coverage found in plans of its type, including dental, major medical, optical, drug and disability benefits. For the purpose of this proceeding it is admitted that no covered employee or his family is entitled to receive a major medical benefit for any condition arising out of the state of pregnancy nor is any covered employee entitled to a benefit which arises out of a disability caused by preganacy.*

Plaintiffs are a group of persons, both male and female, who are employed by the City of New York, or its related agencies, who have brought the present action on behalf of themselves and as *representatives of a class* which is composed of "*(a) all female* employees of the City of New York . . . who are capable of becoming pregnant or did become pregnant; *and (b) males* employed by the City . . . who . . . had a wife or a female dependant capable of becoming pregnant or who became pregnant" (3a-4a) (emphasis supplied).

B. The Relevant Claim

Plaintiffs have asserted a single claim and cause of action against defendant H & S Plan. That single cause of action alleges that defendant H & S Plan has violated

* The benefits provided by defendant H & S Plan accrue to a covered employee *and* his family *except* for the disability benefit which accrues exclusively to the covered employee himself.

Title VII of the Act by discriminating against plaintiffs and the class they represent:

> "because of their sex in that defendants[*] have established and administered the D.C. 37 Health & Security Plan which offers no temporary disability benefits for pregnancy and pregnancy related conditions while wage replacement disability benefits are paid for temporary disabilities resulting from other conditions.
>
> * * *
>
> [and] which includes a Family Major Medical Option . . . [excluding] expenses for normal pregnancy (37a-38a).

In reverse order, the complaint addresses itself to two claimed discriminatory practices engaged in by defendant, H & S Plan.

The latter claims that Title VII is violated when defendant H & S Plan provides medical coverage to all employees, male and female, and their families, which coverage denies pregnancy related benefits to the covered employee herself, if she is female, or if the male is the covered employee, to his spouse or dependent.

The other claimed violation of Title VII follows from the assertion that while defendant H & S Plan provides a disability benefit, *i.e.*, "wage replacement", for all covered employees, both male and female, it does not include

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* The City and D.C. 37 are also named as defendants in this cause of action. Since defendant H & S Plan is a separate trusteed qualified benefit plan, the nexus of these additional defendants to this particular cause of action is unclear. The writer submits that it may be assumed that they are named in this particular part of the complaint by reason of the fact that defendant H & S Plan's existence grows out of collective bargaining agreements between the two above added defendants.

within that general coverage, additional coverage for that special gender related disability particular to women, to wit pregnancy.

C. The Decision of the Court Below

The Court below dismissed plaintiffs' complaint for failure to state a cause of action. The District Court opined that the mere fact that the complaint alleges the existence of benefit and disability programs which make distinctions in coverage based upon the state of pregnancy does not support a cause of action asserting an unlawful discrimination based upon sex or gender (296a).

The Court below noted that the "threshold question is whether disparity of treatment between pregnancy related disabilities and other disabilities [standing alone] can be classified as discrimination because of sex (or gender)" (297a). In answer to this question the District Court held that the existence of a "disparity of treatment based upon pregnancy does not in and of itself constitute such discrimination" (299a). In support of its disposition in this case, primary reliance was placed by the District Court upon *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) and in particular upon footnote 20 of that opinion found on pages 496-7.

The Court below, recognizing that plaintiffs would have a cause of action *if* they could allege that the existing benefits provided by the benefit plans in question were in and of themselves discriminatory, as opposed to the mere failure to include a single gender related risk, gave plaintiffs the right to replead their case asserting these facts (299a-303a). Plaintiffs waived this right to replead and consented to the entry of a final judgment against them (314a).

D. Subsequent Proceedings

This Court summarily reversed the District Court and remanded this matter for further proceedings not inconsistent with its opinion in *Communications Workers* v. *American Tel. & Tel., Long Lines Dept.*, 513 F.2d 1024 (2nd Cir. 1975).

Thereafter four of the defendants herein* petitioned for *certiorari* to the Supreme Court of the United States. That petition was granted and the matter was remanded to this Court for further proceedings not inconsistent with the opinion of the Supreme Court in *General Electric Co.* v. *Gilbert*, 429 U.S. ——, 97 S. Ct. 401 (1976).

This Court thereupon vacated the mandate in accordance with which it had summarily reversed and remanded the order of the Court below for further proceedings. The effect of this vacature was to again bring all the parties to this case** before this Court for an appeal from the original decision of the Court below.

The current posture of this case is therefore the same as that which abided prior to this Court's summary reversal of the order and decision of the Court below, except that this Court has been directed by the Supreme Court to review this case in light of the decision of the Supreme Court in *General Electric* v. *Gilbert, supra.*

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* Social Service Employees Union; Social Service Employees Union Welfare Fund; United Federation of Teachers; and United Federation of Teachers Welfare Fund.

** The four defendants who petitioned the Supreme Court are before the Court by reason of the remand from the Supreme Court. The 13 other defendants have been brought back before this Court by reason of this Court's vacature of its prior order remanding this proceeding to the District Court.

E. Summary of Argument

Plaintiffs' complaint fails to state a cause of action against defendant H & S Plan. *Nowhere* in the single cause of action asserted against this defendant do plaintiffs *allege* that the *benefits provided have a discriminatory impact.*

To the contrary, plaintiffs ignore the existing benefit structure and go outside of it in order to manufacture their claim of discrimination. Plaintiffs have failed to allege that the existing benefit structure gives men greater advantages than women. Until that is asserted, no claim for discrimination is made out.

The mere fact that a single gender related risk is not included within an otherwise sexually neutral schedule of benefits,* cannot serve to create a violation of Title VII.

POINT I

Plaintiffs' complaint against defendant H & S Plan was properly dismissed for failure to state a cause of action by reason of plaintiffs' failure to allege that defendant H & S Plan has established an existing schedule of benefits which currently provides greater benefits to men as opposed to women.

A. General Statement

The decision of the Supreme Court in *General Electric* v. *Gilbert, supra,* essentially affirms the correctness of the District Court's dismissal of the complaint herein as well

* No claim is made by plaintiffs that the existing benefit structure favors males as opposed to females, nor have plaintiffs availed themselves of the opportunity to amend their pleading accordingly. For the purpose of this appeal, therefore, the sexual neutrality of the benefit structure within itself must be deemed true.

as its reliance upon and its analysis of *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) as support for its order.

The decision of the Supreme Court in *Geduldig* v. *Aiello*, *supra*, was correctly interpreted by the District Court as signaling a return to the basic principle of law which has traditionally controlled the focus of questions involving claims of unlawful discrimination.*

That principle in the labor relations field, simply stated, is that when one provides benefits to employees or prospective employees, access to those benefits must be equally available to all without regard to sex or race. That principle is further refined by the fact that not only must there be equal access, but there must be equal value upon access. Essentially, whatever benefits are to be provided to employees must be provided with an even hand and in a sexually and racially neutral manner.

There can be and is no disagreement between plaintiffs and defendant H & S Plan on this proposition. For example, in prior proceedings herein plaintiffs have cited and relied upon cases such as *Bartmess* v. *Drewreys Ltd. U.S.A., Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. den.* 404 U.S. 939 (1971); *Rosen* v. *Public Serv. Elec. and Gas Co.*, 477 F.2d 90 (3rd Cir. 1973); and *Fitzpatrick* v. *Blitzer*, 8 FEP 875 (D.C. Conn. 1974). In each of these cases discriminatory conduct was found for there was an employ-

* It is important to note the obvious at this point. All choices are discriminations. However, all discriminations are not unlawful. The use of the word "discrimination" in this brief and, it is submitted, in the *Aiello* case refers exclusively to "unlawful" discrimination and does *not* mean that no "choices" have been made within comprehensive programs which may result in particular points of differential treatment in minor ways within the classes affected.

ment advantage *given* to one group which was not given to another—and that excluded group was a protected class.

In *Bartmess,* male employees, as a class, were permitted to work at their jobs until their mandatory retirement age of 65 was reached. Female employees, on the other hand, were forced to retire at age 62 and could not work to age 65. It is clear from this, that all female employees, a protected class, were deprived of the right to continued employment and the opportunity to earn income up to age 65—while men were *given* this right.

In *Rosen,* the Court was faced with a complex pension plan which, under certain circumstances, allowed for the fact that a woman could retire at a given age with a given pension while a man, with the same years of service and the same retirement age, would get a lesser pension. In this case also the Court found a protected gender related class, albeit male, which was not receiving a benefit which was being *given* to similar female employees.

In *Fitzpatrick,* the Court was again faced with a gender related class of employees who were not being given benefits that were available to other similar employees. The State Retirement System in Connecticut allowed "women employees having 25 or more years of state service, the right to retire with full pension rights five years earlier than men with identical service qualifications." *Fitzpatrick* v. *Blitzer, supra* at 878. The system also had a reduced retirement benefit formula applicable to those who retired earlier than the normal retirement date. Once again males, as the protected gender related class, complained they were being discriminated against in favor of females in that, as a class, females were *given* better re-

tirement benefits than males—and once again that relief was granted.

The above cases merely touch upon this area which is replete with similar applications of the law as all understand it and plaintiffs and defendant H & S Plan are at one on this issue.

It is against this background that the *Aiello* case was examined. Regardless of the theory upon which one believes *Aiello* was decided, one thing stood out clearly. *In order to make out a case for discrimination based upon sex* one must prove that the existing benefits, as given, have a discriminatory impact upon a protected class.*

Here again we have a proposition upon which both the plaintiffs and defendant H & S Plan agree. As plaintiffs have stated in footnote 23 on page 38 of the brief they previously submitted at the first time this matter was before this Court "the [discriminatory] impact of a classification is measured by how effectively it operates to exclude only members of the protected class" from the benefits *being provided.*

In essence, one does not and may not go outside of the benefits being provided to determine whether there is a discriminatory practice which has an adverse impact upon a protected class. One looks at the benefits being provided the classes covered and determines whether all classes have an equal opportunity to avail themselves of benefits of equal value. If that question is answered negatively nothing

* This principle is not limited to sex but applies equally to any and all protected classes.

further need be shown—for discrimination exists. If that question is answered affirmatively then judicial inquiry stops there for no discrimination has been shown. To go beyond that point and evidence that additional gender related benefits have not been given and would be beneficial to a protected class, does not go to the proof of discrimination but goes to another question not in issue here—affirmative action.

The above was precisely the position taken by the Supreme Court in *Aiello*. In distinguishing *Reed* v. *Reed*, 404 U.S. 71 (1971) and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), it said "the California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities." *Geduldig* v. *Aiello, supra* at 496. If one holds to the proposition that the exclusion of a gender related risk from a comprehensive program of risk protection is *prima facie* discrimination, then the above quoted sentence is unintelligible and confusing at best.

However, if one's starting point for inquiry is the impact of the actual benefits being provided to the covered classes, then the above quote is clear.

The California disability program did not exclude anyone from benefit coverage because the benefits *as provided* treated all persons alike. Men and women collectively had the same opportunity to draw down the *existing* benefits which had equal value and therefore there was *no adverse impact upon a protected class.* The mere fact that one particular gender related risk, pregnancy, was not included is irrelevant because the existing plan

and protections provided by the existing coverage was sexually neutral and had no factors *within it* which caused and adverse impact upon women.

This approach was the only one which brought sense to the balance of the Supreme Court's statement in *Aiello*. The Court went on to say:

> "The program divides potential recipients into two groups—pregnant females and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes". *Supra* at 496-497 fn. 20.

If one merely looks at benefits *not* being provided to a protected class in order to determine whether there is an alleged discriminatory practice, then again we would find the Supreme Court speaking with the voice of Lewis Carroll.

However, if one focused on the impact of the *benefits actually provided* to protected classes, then one clearly sees what the Supreme Court was saying. The benefit program *as it was constituted* provided equality of treatment to all persons covered by it—both male and female. Within that framework there was no protected class which could show or allege any adverse impact. There was, therefore, nothing discriminatory within the benefit package itself.*

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* To the contrary, there is strong suggestion to the effect that a pregnancy disability benefit may be discriminatory against males! If "the fiscal and actuarial benefits of the program" *as constituted* accrue to "members of both sexes" equally, then adding coverage for a gender related risk which is exclusively female could operate to deprive males of the "fiscal and actuarial benefits" attendant upon the cost of that special benefit.

The above was the basis upon which the Court below dismissed plaintiffs' complaint. As the District Court stated, the "disparity between the treatment of pregnancy-related and other disabilities does not of itself constitute discrimination on the basis of sex (or gender) within the prohibition of either Title VII or of the Fourteenth Amendment" (303a).

The District Court's analysis and opinion has now been approved and essentially affirmed by the Supreme Court in *General Electric.*

The plaintiffs in the *General Electric* case charged the defendant with violating Title VII by discriminating against them on the grounds of sex since the company's disability benefit program "routinely . . . did not provide disability benefit payments for any absence due to pregnancy." *General Electric* v. *Gilbert, supra* at 404. The Supreme Court categorically rejected plaintiffs' claim by restating its holding that "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 408.

The following analysis of the relevant portions of the complaint itself will show that plaintiffs have failed to plead anything more than the existence of an under-included gender related risk as the basis of their cause of action. The failure to plead that the *benefits as provided* discriminate between the classes covered was and is fatal to their complaint.

B. The Disability Claim

Plaintiffs have alleged that defendant H & S Plan's disability benefit discriminates against women simply because it:

> "offers no temporary disability benefits for pregnancy and pregnancy-related conditions while wage replacement disability benefits *are paid* for temporary disabilities resulting from *other conditions.*" (37a-38a) (emphasis supplied).

At this point it is important to note what is *not* being claimed. It is not claimed that:

(1) Men and women do not have *equal access* to the existing benefit which pays for disabilities "resulting from other conditions"; or that

(2) Men and women cannot avail themselves equally of the fiscal and actuarial value of the *benefit being offered;* or that

(3) The benefit, *as offered,* favors men as opposed to women.

To the contrary, plaintiffs' complaint stubbornly looks to what is not being offered as the sole basis for the alleged discrimination they complain of.* This obstinate "freedom now" pleading must fail as a matter of law.

This case, as it applies to defendant H & S Plan, does not deal with the usual employment practice discrimination which concerns itself with "firm" conditions of employment —such as the right to employment, promotion, seniority,

* Plaintiffs have refused to avail themselves of the right they had to amend their pleading to correct this defect (300a-303a, 314a).

shift differential or job assignment. The analysis of these cases is fairly set and simple. Generally there exists an opportunity which has been *given* to a male and which has been denied to a female. For instance, if only males have been promoted to a foreman's job and there are qualified women who have been passed over and denied that opportunity, clearly a *prima facie* case for discrimination has been made out.

In that situation, and in all similar "firm" situations, there exists a person who is *given* a benefit which *he currently uses exclusively* and that same benefit is *being denied to women,* a protected class, for no legal reason.

That is *not* the condition extant with the fringe benefits here in question. Fringe benefits, such as disability or major medical programs, are "soft" conditions of employment and are not so susceptible of simple analysis. The "soft" fringe benefits, such as disability payments, are a term and condition of employment that each worker hopefully will never have to use. Its availability is conditioned upon a random happening over which, as a general rule, no one group has control. It is, in essence, a lottery which no one wants to win.

The method of relevant analysis of this "soft" benefit must therefore differ from that of a "firm" condition of employment. There is no man *in* a job a woman cannot be promoted to, nor is there a man *getting* a higher wage than a woman for the same work. "Soft" fringe benefits are "expectancies" and as expectancies require different analysis.

To analyze this type of "soft" benefit to determine if discrimination between sexes exists, two elements must be looked at. Since the actual *receipt* of the benefit is dependent upon a random happening, *i.e.,* disabling sickness, one's point of inquiry must start at and include the following questions:

(a) Do men and women have equal random chance to draw down the actual benefit; and

(b) Once the benefit drawn is down do men and women receive equal value from it?

If both of these questions are answered "Yes" then, it is submitted, there is no discrimination on the grounds of sex.

Surely one could not seriously dispute that a disability plan which provided for payments in the event of a disability arising out of an accidental injury on the job is sexually neutral and cannot be attacked unless women were not permitted to receive its benefits. Nor could anyone seriously dispute that as additional sexually neutral risks are added to its coverage, such as payment for disabilities arising out of any accidental event or from psychiatric conditions, no discriminatory conduct occurs merely because a particular gender related risk is omitted.

There is no dispute on the above because the *benefit provided* is, as a statistical fact, random in happening *and* men and women have equal opportunity to obtain the protection of the existing coverage.

It is respectfully submitted that at no point, no matter how many tiers of risk coverage are added, can this type

of program be deemed to discriminate against a protected class on the grounds of sex *unless* the protected class cannot draw down the *existing benefit.*

Yet, plaintiffs' complaint nowhere alleges that women, the protected class, are in any way, shape, manner or form excluded from defendant H & S Plan's program in which "benefits are paid for temporary disabilities resulting from [the covered] other conditions" (38a). Nor is it anywhere claimed that the disability risks actually covered under the term "other conditions" favors men over women.

Since this is true from the face of the complaint, plaintiffs have failed to allege their cause of action—in spite of their attempt to manufacture one by the irrelevant reference to an excluded gender related risk such as pregnancy.

C. The Major Medical Claim

Everything which has been previously said with respect to plaintiffs' alleged cause of action concerning defendant H & S Plan's disability benefit program applies with equal vigor to that part of the complaint which relates to the existing major medical program. Again plaintiffs seek to create a cause of action by the exclusive reference to the fact that pregnancy related expenses are not covered under the Plan. The actual benefit structure of the Plan is not touched upon and, for the purposes of this appeal, must be deemed equal in its application. The mere fact that H & S Plan does not include one gender related risk within its otherwise sexually neutral program will not support a claim of discrimination based upon sex.

The major medical benefit, however, has a separate and distinct quality which plaintiffs have not considered at all!

While the disability benefit is personal to the employee, the major medical benefit attaches to the family of the covered employee. Not only is a *female employee denied* medical expense reimbursement for her pregnancy but also a *male employee* is *denied exactly that* medical expense *reimbursement* for his wife's pregnancy. The effect of this underincluded risk within the major medical benefit structure therefore falls equally upon men and women and there is no adverse impact upon a protected class—and it is on behalf of both males and females that plaintiffs are bringing this alleged sex discrimination case (3a-4a).

As was stated by the Court in *Satty* v. *Nashville Gas Co.*, 384 F. Supp. 765 (D.C.M.D. Tenn. 1974):

> "There is no doubt that the [major medical] program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee-beneficiaries of the plan. The [major medical plan] proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases. Thus, for a male employee whose wife is pregnant the insurance benefit is the same as provided to a female employee such as plaintiff." *Id.* at 766-7
>
> * * *
>
> "So far as the issue relating to the [major medical] program is concerned, the court finds no distinction in the application, operation or effect of the [major medical] plan to support a finding of unlawful discrimination by reason of sex since all employees, male or female, receive the same benefit." *Id.* at 767

Defendant H & S Plan respectfully submits that no better analysis of the problem exists than set out by the

Tennessee court. Since "all employees, male or female, receive the same benefit", it found that there could not be a discriminatory practice based upon sex. So too, in the instant case, the major medical program in question pays or does not pay the same reimbursement to all employees regardless of sex. Since the defendant H & S Plan gives to all employees, male or female, the same benefit, it follows that the defendant H & S Plan has not engaged in any discriminatory conduct.

However, this argument almost appears superfluous as it applies to the facts of this case. Plaintiffs do not allege that the existing major medical program discriminates against women in any of the benefits being provided. There is not one single word or claim which asserts that the covered risks favor men as opposed to women. The only "fact" alleged to support plaintiffs' claim is the omission of the single gender related risk of pregnancy.

That omission, absent a claim that the existing benefit structure, as provided, has an adverse impact upon women, a protected class, cannot support a cause of action alleging sex discrimination.

D. Summary

All of the foregoing has shown that plaintiffs' complaint *nowhere alleges* that the *existing benefit programs* administered by the Trustees of the defendant H & S Plan have an *adverse impact* upon a protected class—*women.* Without such an allegation plaintiffs have not stated a cause of action and the mere existence of an excluded gender related risk—pregnancy—does not cure that defect.

POINT II

Plaintiffs may not, at this stage of the proceeding, change the theory upon which they have asserted the single cause of action alleged against defendant H & S Plan.

Plaintiffs' present brief to this Court represents a creative, though legally insufficient, attempt to step away from the very claim they have doggedly asserted against defendant H & S Plan and redraft their pleading at this appellate level to encompass what they now believe to be a new and novel theory to support their claim. This they may not do.

No extended legal argument or analysis is required to parse out the single cause of action plaintiffs have asserted against defendant H & S Plan—just plaintiffs' own words. Up to this point in time, plaintiffs, with admirable consistency, have diligently claimed that H & S Plan has violated their rights because it has "established and administered [a] Plan which offers no temporary disability benefits for pregnancy or pregnancy related conditions while wage replacement disability benefits are paid for temporary disabilities resulting from other conditions . . . [and] which includes a Family Major Medical Option . . . [excluding] expenses for normal pregnancy (37a-38a).

Plaintiffs have based this single bifurcated claim exclusively upon their belief that:

> "It goes without saying that a classification on the basis of pregnancy for the purpose of determining entitlement to fringe benefits has a disproportionate impact upon women since it never can affect [*sic*] men."

(Plaintiffs' brief previously submitted to this Court on original appeal, p. 22.)

For the entire time that this matter has been before the courts, plaintiffs have steadfastly stood behind their argument and defended this theory against all challenge.

One must admire the resolution with which plaintiffs proceeded forward upon their theory of their case. Not only did they refuse to amend their pleading when given an opportunity to do so, but they were also willing to admit that the single claim against plaintiff H & S Plan presents "precisely the issue that the Supreme Court will decide in [*Gilbert*]" (Statement, Plaintiffs' Counsel, p. 55 Transcript July 10, 1975) and to further admit that an adverse decision to their theory of prima facie liability in *Gilbert* "may wash out this entire case." *Id.* at 56.

After having been exposed to plaintiffs' firm and consistent commitment to their own characterization of their own cause of action and the controlling effect of Gilbert upon that claim these past three years, it is with some degree of surprise that one finds that plaintiffs are now urging that they never meant what they said and clearly expressed in the first instance.

It is also not without some additional degree of surprise that plaintiffs now seem to suggest that defendants, as a group, have engaged in some sort of parallel action which, taken as a whole, deprives plaintiffs of a protected right. This precise question was addressed directly by defendant H & S Plan at the July 10, 1975 hearing in the Court below, when plaintiffs' counsel was asked by Judge Knapp whether they were alleging or intended to prove that defendant H & S Plan established its benefit structure by agreement with any other person or entity. At that time plaintiffs'

counsel candidly and directly replied in the negative, stating with respect to defendant H & S Plan:

> "Mr. Perkel is correct, I believe, in terms of my complaint that there is no allegation that [defendant H & S Plan] . . . has entered into agreements with any of the other funds" *Id.* at 55.

In the face of this admission one can well understand plaintiffs' careful avoidance of a reference to any alleged concerted action or agreement between or among the defendants concerning a conspiracy to deprive plaintiffs of their civil rights. To the contrary, the only thing which passes for support for this newly found theory is plaintiffs' careful, but less than candid use of the plural noun "defendants" when discussing what they now claim to be a "collective" adverse impact upon a protected class.

This approach should receive scant consideration by this Court. It has its roots in the old and stale theory of "conscious parallelism" which used to abide in anti-trust cases. That theory is now, however, of no utility in light of the holding of the Supreme Court in *Theatre Enterprises Inc.* v. *Paramount Film Dist. Corp.*, 346 U.S. 537 (1954), wherein it was stated that "this Court has never held that proof of parallel business behavior conclusively establishes agreement, or phrased differently, that such behavior itself constitutes a Sherman Act offense." *Id.* at 541.

Plaintiffs in the instant case affirmatively admit there was no agreement between the defendant H & S Plan and any other fund. They fail to allege or claim* that there is

* This is particularly evidenced by their refusal to amend their pleading when they were given the opportunity to do so.

an agreement among any of the parties to deprive women of their rights. They merely have stepped back and said "look at the total effect of what these separate and disparate defendants have done!"

This distant overview cannot substitute for a cause of action or create unlawful action in and of itself. Plaintiffs have chosen the method by which they opted to assert their cause of action and play their hand. They obviously do not like the cards they dealt themselves and are now claiming a "mis-deal". Having already chosen to "stand pat" (not replead) and "call" (appeal), they may not now reshuffle the deck.

Conclusion

The decision of the District Court dismissing the complaint as it applies to defendant H & S Plan should be affirmed.

Dated: New York, New York
May 18, 1977

Respectfully submitted,

HARTMAN & CRAVEN
Attorneys for Defendant-Appellee
District Council 37 Health & Security Plan

Of Counsel:
BERTRAM PERKEL
VICTOR METSCH

#6129

Affidavit of Service by Mail

In re:

Women in City Government United v City of New York

State of New York
County of New York, ss.:

Harry Minott,

being duly sworn, deposes and says, that he is over 18 years of age. That on MAY 18 1977, 197 , he served 3 copies of the within Brief

in the above-named matter on the following counsel by enclosing said three copies in a securely sealed postpaid wrapper addressed as follows:

Rabinowitz, Boudin & Standard, Esqs.
30 East 42nd Street
New York, New York 10017
(Attorneys for Plaintiffs)

The Corporation Counsel of the City of New York
Municipal Building
New York, New York 10007
(Attorney for Defendants-Appellees)

Edward L. Norton, Esq.
250 Broadway
New York, New York 10007
(Attorney for Defendant-Appellee)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Harry Minott

Sworn to before me this 18th day of May, 1977

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
No. 30-2673500
Qualified in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1979

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Mirkin, Barre, Saltzstein & Gordon, Esqs.
98 Cutter Mill Road
Great Neck, New York 11021
(Attorneys for Defendants-Appellees)

Breed, Abbott & Morgan, Esqs.
One Chase Manhattan Plaza
New York, New York 10005
(Attorneys for Defendants-Appellees)

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Trubin, Sillcocks, Edelman & Knapp, Esqs.
375 Park Avenue
New York, New York 10022

(Attorneys for Defendant-Appellee)

Schulman, Abarbanel & Schlesinger, Esqs.
350 Fifth Avenue
New York, New York

(Attorneys for Defendant-Appellee)

and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

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